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United States of America

8 UNITED STATES DISTRICT COURT
9
10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 CUAUHTLAHTOUAC HERNANDEZ (3),

15 Defendant.

) Criminal Case No. 08CR1436-LAB

) Date: August 18, 2008

) Time: 2:00 a.m.

) Before Honorable Larry A. Burns

) Courtroom 3

) UNITED STATES' RESPONSE AND
) OPPOSITION TO DEFENDANT'S
) MOTION IN LIMINE TO

16 (1) SEVER MR. HERNANDEZ'S
) TRIAL FROM CO-DEFENDANT
) ESPINOZA'S TRIAL;

17 (2) EXCLUDE EVIDENCE OF MR.
) HERNANDEZ'S OTHER CRIMES,
) WRONGS, OR ACS UNDER FED.
) R. EVID. 404(B);

18 (3) EXCLUDE EVIDENCE OF CO-
) DEFENDANT ESPINOZA'S
) OTHER CRIMES, WRONG, OR
) ACTS UNDER FED. R. EVID
) 404(B)

19 (4) EXCLUDE EVIDENCE OF
) INCRIMINATORY
) STATEMENTS OF
) CO-DEFENDANTS SMITH AND
) BARRAZA UNDER CRAWFORD
) V. WASHINGTON;

20 (5) EXCLUDE EXPERT TESTIMONY
) OR, IN THE ALTERNATIVE,
) HOLD A KUMHO HEARING; AND

21 (6) ADMIT EVIDENCE OF CO-
) DEFENDANTS SMITH,
) BARRAZA, AND ESPINOZA'S
) THIRD PARTY CULPABILITY

TOGETHER WITH STATEMENT OF
FACTS AND MEMORANDUM OF
POINTS AND AUTHORITIES

COMES NOW, the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Steven De Salvo, Assistant United States Attorney, and hereby files its opposition to Defendant's motions in limine in the above-captioned case. Said memorandum is based upon the files and records of this case.

I**STATEMENT OF THE CASE**

On April 30, 2008, a grand jury sitting in the Southern District of California returned a three-count indictment charging Defendants Dominick Smith ("Smith"), Robert Barraza ("Barraza"), Cuauhtlahtouac Hernandez ("Hernandez"), and Isaac Espinoza ("Espinoza") (collectively, "Defendants") with transportation of illegal aliens and aiding and abetting. On May 6, 2008, Defendants were arraigned on the Indictment. Defendants Barraza and Smith have pled guilty; trial is set for the remaining defendants, Espinoza and Hernandez, on August 19, 2008.

II**STATEMENT OF FACTS**

On April 6, 2008, Supervisory Border Patrol Agent J. Dinise was performing anti-smuggling duties near Alpine, California. This area is located approximately 7 miles west and 12 miles north of the Tecate Port of Entry. Agent Dinise was operating an unmarked agency vehicle. At approximately 8:50 p.m., Agent Dinise observed two vehicles traveling eastbound on Interstate 8. The first vehicle was a blue Ford Escort; the second vehicle was a green Dodge Ram 2500. Agent Dinise observed the two vehicles traveling in close proximity to one another, making the same lane changes, and it appeared as though the Dodge Ram was riding in tandem with the Ford Escort. Based on his background, training, and experience, Agent Dinise concluded that the Ford Escort a scout vehicle and that the Dodge Ram was intended to be a load vehicle. The two occupants of the Ford Escort were later identified as Defendant Hernandez, who was driving, and Defendant Espinoza, who was the front seat passenger.

Border Patrol Agent Joseph Remenar, who was in a separate unmarked vehicle, assisted in the

1 surveillance. Both agents continued surveillance of the two vehicles as they approached the Willows
2 Road Exit on Interstate 8. At the Willows Road Exit, both vehicles exited the Interstate towards the
3 Viejas Casino, which is a common meeting place for smugglers to load contraband. The two vehicles
4 approached the main entrance of the Viejas Casino and parked together. Agent Dinise observed two
5 occupants exit from each vehicle. While outside, the occupants spoke to each other for approximately
6 ten minutes before re-entering their vehicles. The vehicles then exited the casino.

7 Border Patrol Agent Benjamin Blanchard, also in a separate vehicle, assisted in the surveillance
8 of the vehicles after they left the casino. Agent Blanchard observed the Ford driving just ahead of the
9 Dodge. The Dodge, however, passed the Ford as it continued eastbound on Interstate 8. Agent
10 Blanchard passed the Ford and continued surveillance on the Dodge as Agents Dinise and Remenar
11 continued surveillance on the Ford. Both vehicles continued driving eastbound in close proximity until
12 the Dodge began accelerating approximately two miles west of the Buckman Springs Road Exit of
13 Interstate 8. Agent Blanchard eventually lost track of the speeding Dodge.

14 Agents Dinise and Remenar continued following the Ford. The Ford drove eastbound on
15 Interstate 8 until it exited at Mountain Springs Road. As Agent Remenar drove eastbound on the
16 interstate, Agent Dinise exited at Mountain Springs and saw the Ford immediately turn around and head
17 westbound on Interstate 8 – a maneuver that Agent Dinise believed was an attempt to scout the
18 smuggling route for the Dodge. The Ford continued westbound on Interstate 8, exited at the Jacumba
19 Exit, and pulled into the Shell Gas Station located just off of the Interstate. Both Hernandez and
20 Espinoza exited the Ford and entered the convenience store located there. Hernandez and Espinoza
21 then returned to their vehicle and re-entered the westbound lanes of Interstate 8. Agents Dinise and
22 Blanchard continued to conduct surveillance on the vehicle as it traveled westbound, until it exited at
23 the Crestwood Road Exit. The Ford turned into the parking lot of the Golden Acorn Casino and parked
24 outside of the convenience store, near the gas pumps. Agents Dinise and Blanchard approached the
25 vehicle and identified themselves as Border Patrol Agents.

26 Meanwhile, Agent Remenar drove westbound on Interstate 8 towards the Jacumba Exit and
27 noticed a pickup truck on the shoulder of the highway. Agent Remenar recognized the truck as the
28 same Dodge Ram 2500 that had been driving in tandem with the Ford Escort. As Agent Remenar

1 approached the pickup, the pickup re-entered the westbound lanes of the Interstate. A few hundred
2 yards later, the pickup then pulled onto the shoulder of the highway again. This area of the Interstate,
3 which is less than two miles from the border, is a well- documented alien smuggling location. Agent
4 Remenar passed the Dodge and temporarily lost sight of the activity on the shoulder.

5 In addition, Border Patrol Agents assigned to the Boulevard, California Border Patrol Station
6 had been tracking a group of undocumented aliens that were headed towards the same area where the
7 Dodge had pulled over to the shoulder. Agent Remenar believed that the Dodge had just loaded a group
8 of undocumented aliens and relayed his observations to Border Patrol Agent Francisco Rivera. Agent
9 Rivera was operating a marked Border Patrol pursuit sedan with fully functional emergency lights and
10 audible siren. Agent Rivera, who had been waiting at the Jacumba Exit, entered onto the westbound
11 lanes of Interstate 8 and saw the Dodge traveling westbound on Interstate 8 as it passed the McCain
12 Valley Bridge, located approximately 1.5 miles east of the Ribbonwood Road Exit. Agent Rivera
13 requested additional marked units to assist. Agent Rivera initiated his emergency lights and audible
14 siren in attempt to stop the Dodge. The Dodge failed to yield to Agent Rivera's marked agency vehicle
15 and attempted to flee, exiting Interstate 8 at the Kitchen Creek Road Exit. Border Patrol agents
16 successfully deployed tire deflation devices at the exit. With tires spiked, the Dodge moved erratically
17 along the off-ramp, then accelerated and drove through the stop sign. The Dodge re-entered the
18 interstate westbound, then cut across the median and traveled the wrong way against eastbound traffic
19 for 100 yards before crashing at the shoulder. Defendants Smith and Barrazza fled from the truck and
20 were eventually apprehended.

21 Five aliens were apprehended next to the Dodge. Another 12 aliens were apprehended
22 approximately 50 yards south of the Dodge attempting to flee. All of the aliens admitted to being
23 citizens and nationals of Mexico. When asked to present any immigration documents that would allow
24 them to enter into the United States legally, all of the aliens stated that they had no such documents. All
25 of the aliens were then placed under arrest for being present in the United States not in possession of
26 any valid immigration documents.

27 Agents detained three material witnesses: Clemente Morales-Chaparro, Roberto Aguilar-Peez,
28 and Rogelio Oplea-Mendoza. Each stated that they were citizens and nationals of Mexico illegally

1 present in the United States. They admitted to entering the United States illegally. They all stated that
2 they were going to pay between \$1,800.00 to \$2500.00 to be smuggled into the United States. None
3 of the aliens made statements directly implicating Hernandez or Espinoza.

4 Agents apprehended cell phone records from Barraza, who was in the Dodge, and Espinoza,
5 who was in the Ford. The cell phone records show that Espinoza called Barraza, and Barraza called
6 Espinoza, before the vehicles were seen driving in tandem. In addition, Agent Remenar recognized
7 Isaac Espinoza as the same person he had observed driving the green Dodge pickup truck three days
8 earlier. Agents arrested both Hernandez and Espinoza.

9 Defendant Hernandez, after being advised of his Miranda rights, stated that he had left his house
10 in Chula Vista to go the Golden Acorn Casino and that his friend Espinoza joined him. He contended
11 that he drove to the casino without making any stops. He denied traveling with anyone else or any other
12 vehicles. When confronted with the fact that agents had observed him and Espinoza stopping and
13 meeting with the other co-defendants, Hernandez changed his story, stating that he got lost and had to
14 call his girlfriend for directions. However, he continued to deny that he followed the Dodge or spoke
15 to anyone in the Dodge.

16 Defendant Espinoza, after being advised of his Miranda rights, stated that he and his friend,
17 Hernandez, went from his house in Chula Vista to the casino. He refused to make any additional
18 statements.

19 III

20 IN-LIMINE MOTIONS OF THE UNITED STATES

21 A. THE MOTION TO SEVER IS MOOT

22 Espinoza has pleaded guilty; accordingly, the motion to sever is moot.

23 B. THE MOTION TO EXCLUDE OTHER CRIMES UNDER FED. R. EVID. 24 404(B) SHOULD BE DENIED

25 “Other crimes” evidence of Defendant’s prior involvement in an ongoing alien smuggling
26 conspiracy, as a driver for the alien smuggling organization, is relevant under Rule 404(b) to show
27 planning, intent, and knowledge of the alien smuggling in this case. Other evidence of Defendant’s
28 2004 arrest as a passenger in a vehicle smuggling aliens is similarly relevant.

1 This evidence meets the Ninth Circuit's requirements for introducing evidence under Rule
 2 404(b). First, the evidence proves a material issue in the case – Defendant's intent to aid and abet the
 3 transportation of aliens. Second, the prior crime – in which Defendant drove vehicles involved in
 4 transporting aliens – is identical to the crime charged here. Third, the evidence is supported by
 5 testimony from a co-conspirator who had personal knowledge of Defendant's involvement. Fourth, the
 6 witness is expected to testify that Defendant's prior crimes occurred in 2006, which is not remote in
 7 time. Accordingly, this evidence is highly probative and outweighs the danger of unfair prejudice. See
 8 United States v. Montgomery, 150 F.3d 983, 1000 (9th Cir. 1998).

9 **C. THE COURT SHOULD DENY THE MOTION TO EXCLUDE EVIDENCE**
 10 **THAT ESPINOZA DROVE THE LOAD VEHICLE 3 DAYS PREVIOUSLY**

11 The government's theory of the case is that all of the co-defendants not only aided and abetted
 12 each other, but were each part of a conspiracy (though uncharged in this indictment) to transport aliens.
 13 Specifically, the theory is that defendants Hernandez and Espinoza (who were in the Ford vehicle)
 14 conspired with defendants Smith and Barraza (who were in the green Dodge pickup truck) to smuggle
 15 the aliens, and that Hernandez and Espinoza specifically acted as scouts for load vehicle, the green
 16 Dodge pickup truck. Thus, evidence of any prior connection between the occupants of the Ford vehicle
 17 and the occupants of the Dodge vehicle, and any prior connection of a defendant with either vehicle,
 18 is highly probative evidence. Indeed, it is the essence of the government's case.

19 In this case, one of the arresting Border Patrol agents will testify that he witnessed Espinoza –
 20 who was Hernandez's passenger – driving the same green Dodge pickup only 3 days previously. There
 21 will also be evidence that Espinoza telephoned Barraza, the passenger in the green Dodge pickup, while
 22 the vehicles were traveling in tandem. This is highly probative evidence of knowledge, planning, and
 23 coordination among the defendants. Defendant, however, seeks to exclude the evidence that Espinoza
 24 drove the green Dodge, arguing that the probative value of this evidence is "slim." Defendant is wrong.
 25 To the contrary, this evidence is highly probative. The fact that it might help to establish Defendant's
 26 guilt does not establish that it is prejudicial; the very purpose of probative evidence is to establish guilt.
 27 The question is whether it is unfairly prejudicial. It is not.

28 As the Ninth Circuit has explained, "[e]vidence of coordination between the defendants is

1 convincing circumstantial evidence of an agreement. Factors that a court may consider in analyzing
 2 co-defendants' coordinated activity include a close association between the co-defendants, frequent
 3 contacts, and a commonality of time and goals." United States v. Ortega, 203 F.3d 675, 683 (9th Cir.
 4 2000). In this case, the evidence of coordination obviously satisfies these factors – it establishes a close
 5 association between Espinoza and the green Dodge, and between Espinoza and Barraza, the passenger
 6 in the green Dodge, and, by reasonable inference, a connection to Hernandez, who was driving in the
 7 same car with Espinoza at the time that Ford and the Dodge were observed traveling in tandem. In
 8 contrast to this probative value, Defendant can not establish any unfair prejudice. He can only point
 9 to the fact that the jury might rely on this evidence in convicting him. But that only states the obvious;
 10 the risk of conviction is, of course, a consequence of probative evidence.

11 **D. EXCLUSION OF CO-DEFENDANT'S STATEMENTS**

12 _____ The United States does not intend at this time to introduce statements of co-Defendants at trial.

13 **E. THE MOTION TO EXCLUDE EXPERT TESTIMONY SHOULD BE DENIED**

14 The Court should deny Defendant's motion to exclude expert testimony, because the United
 15 States has given reasonable notice of the testimony. The United States gave notice to Defendant two
 16 weeks before trial that the United States expects to present expert testimony by a Border Patrol agent
 17 that the tandem driving by the two vehicles in this case is consistent with the use of a "load vehicle"
 18 and "scout vehicle" commonly used in the smuggling of aliens. The agent will also testify about other
 19 ways in which in which the load and scout vehicles were driven and their significance to carrying out
 20 the smuggling in this case. The agent has testified in federal court on this topic previously. Court
 21 should admit this expert testimony.

22 If specialized knowledge will assist the trier-of-fact in understanding the evidence or
 23 determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in
 24 question. Fed. R. Evid. 702. It is within the sound discretion of the trial judge to determine whether
 25 or not expert testimony would assist in understanding the facts at issue. United States v. Alonso, 48
 26 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). An
 27 expert's opinion may be based on hearsay or facts not in evidence where the facts or data relied upon
 28 are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. An expert may

1 provide opinion testimony even if it embraces an ultimate issue to be decided by the trier-of-fact. Fed.
2 R. Evid. 704. Defendant has failed to establish that a Kumho hearing is necessary.

3 **F. EVIDENCE OF CULPABILITY OF SMITH, BARRAZA, AND ESPINOZA**
4 **SHOULD BE ADMITTED**

5 _____The United States does not oppose Defendant's motion to introduce evidence of guilty pleas
6 entered by co-defendant Smith, Barraza, and Espinoza. Defendant Hernandez and the government both
7 agree that the co-defendants are culpable parties.

8 **IV**

9 **CONCLUSION**

10 For the reasons set forth above, the United States respectfully requests that the Court grant
11 its motions in limine.

12 DATED: August 11, 2008

13 Respectfully submitted,

14 KAREN P. HEWITT
15 United States Attorney

16 /s/ Steven De Salvo

17 STEVEN DE SALVO
18 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Criminal Case No. 08CR1436-LAB
Plaintiff,)	
v.)	CERTIFICATE OF SERVICE
CUAUHTLAHTOUAC HERNANDEZ (3),)	
Defendant.)	

IT IS HEREBY CERTIFIED THAT:

I, STEVEN DE SALVO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Kurt Hermansen

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 2008.

/s/ Steven De Salvo

STEVEN DE SALVO